First Nations Child & Family Caring Society of Canada

July 20, 2021

LOOKING FOR CLARITY IN CANADA'S FUNDING POSITIONS ON C-92
Part III – Questions and Concerns Regarding Canada's Funding Approach

Questions and Concerns regarding Canada's Funding Approach for C-92:

Canada's current approach appears ad hoc and vague, incorporates untested assumptions about provincial willingness to cost share, fails to clearly disclose what obligations Canada will bind itself to, and fails to provide clear information about the CHRT orders on funding the FNCFS program, which we believe should be considered the minimum standard. This approach replicates the old mindset that has put First Nations children, families, and communities at serious risk of harm. Canada owes a duty to First Nations to ensure they have they are able to fully enjoy their right to "free, prior and informed consent" per UNDRIP and C-92.

The following section lists Caring Society questions and concerns regarding Canada's C-92 funding for First Nations:

1. **Does Canada include funds for the development of service structures, programs, and delivery before the 12-month period for the coordination agreement giving effect to First Nations jurisdiction in the Act expires?** The answer is no. Canada provides funding for communities to consult and develop the law but not to develop and deliver the services. This means a First Nations law may take effect with no infrastructure to deliver services. Provinces, territories and the federal government may be less motivated to provide funding for non-discriminatory service delivery after the jurisdiction (and responsibility) is vested in the First Nation. We know from the agency experience that it takes a minimum of 5 years to develop the services and a further 10 years to achieve predictability in child and family service funding levels.
2. **Why will Canada not include First Nations jurisdiction within the FNCFS Program terms and conditions that engrain the CHRT orders?** Canada refuses to provide First Nations with the option of receiving funding per the FNCFS Program terms and conditions that engrain the CHRT orders even though that program is the only funding approach that has some evidence and the legal rulings underpinning it. Canada's refusal raises concerns that it is trying to escape accountability from the CHRT orders by offloading onto First Nations.
3. **What will Canada do to remedy funding inequalities if the initial funds agreed to by the First Nation prove insufficient**? Canada appears to be taking an approach that it "may" but not "shall" consider a top-up if interim or initial funding is insufficient. This is concerning given that Canada has repeatedly built-in the possibility of adjustments for its funding of agencies and failed to provide top ups to known deficits. This is the issue that led to the CHRT case.
4. **How will Canada ensure equity among and between funding approaches negotiated by First Nations to ensure that funding is needs based versus dependent on the favorability of negotiating**

conditions?

Currently, Canada has five different funding approaches for First Nations Child and Family Services.

a. FNCFS Agencies (2016 CHRT 2, 2018 CHRT 4)
b. First Nations served by federally funded provinces/territories (2021 CHRT 12)
c. C-92 - First Nations with jurisdiction
d. CWJI - First Nations for prevention per a fixed funding pool. It is unclear how many communities are getting prevention funding, what levels and evidence informs this approach and what the outcomes are.

The Tribunal-ordered approaches (a) and (b) are transparent and interim pending long-term reform on funding amounts and structure per the IFSD reports that are publicly available. There is very little, if any, transparency from ISC on (c) and (d), raising concerns about if, and how, Canada is ensuring substantive equality and improving on the CHRT orders per 2018 CHRT 4. Moreover, there is no coherent and public strategy as to how to avoid discrimination among and between these funding approaches.

5. **Will Canada ensure it structures its funding approaches to achieve culturally based child wellbeing outcomes?** Early indications are that Canada is reverting to old funding structures that are not connected to child wellbeing measures. This means that funding will likely be based on arbitrary funding assumptions versus on the actual needs of children and families and community-based visions of child wellbeing. The expectation that Nations will "know what they need" in terms of funding ignores that fact that Canada is not being transparent about the remedies ordered by the CHRT and the known funding gaps and inequities in some of its past funding models.
6. **What will happen to Jordan's Principle funding after First Nations draw down jurisdiction?** Canada's position on Jordan's Principle post-jurisdiction is not clear. Canada has said that Jordan's Principle will continue to apply with no changes; it has also said Jordan's Principle will continue to apply if the requested services/product/support *is not already included in the funding agreement* with the First Nation. Canada's own data show that over 65% of approved individual cases and 87% of approved group cases under Jordan's Principle are for formal equality services, i.e., services that are normally available to all other children. This means that Jordan's Principle is being used to "plug a gap" in other inequitably funded public services for First Nations. Remedying the cross-cutting inequalities as a key priority to support First Nations self-determination is essential. However, a coordination agreement using broad headings like "prevention" risks setting up a situation where ISC considers most Jordan's Principle requests to be covered in the funding agreement and ineligible for funding via the current federal funding envelope for Jordan's Principle.
7. **Why does Canada not adopt and implement the Spirit Bear Plan?** To date, Canada refuses to adopt and implement the Spirit Bear Plan (https://fncaringsociety.com/spirit-bear-plan), meaning that the drivers of child maltreatment (poverty, poor housing, substance abuse, mental health and domestic violence) will continue to be inadequately addressed regardless of the jurisdiction being exercised. A failure to address these drivers will undermine the ability of First Nations to promote family and child wellbeing and safety, regardless of whether the services are delivered under First

Nations or other jurisdiction.

8. **What funding is available for First Nations children resident off reserve?** According to the FN-CIS 2019, 72% of substantiated child welfare reports involve First Nations families resident off reserve, meaning off reserve funding is a key issue for First Nations taking a citizenship versus on/off reserve approach to jurisdiction. Canada has stated that it "assumes" provinces will continue paying for child and family services at the current rate. However, to our knowledge there is no binding agreement between the federal government and provincial governments securing this arrangement. Moreover, Canada has not publicly disclosed a clear and convincing mechanism to ensure substantively equal and needs-based funding if a province chooses not to fund or funds inadequately. Canada simply relies on the division of powers with the provinces, but there is no clear plan on how funding for off-reserve services will be funded if a province does not fund adequately First Nations CFS jurisdiction off reserve. It should be remembered that Jordan's Principle emerged from this very issue (jurisdictional disputes over responsibility for First Nations children). To suggest that the provinces will pay for off-reserve child welfare simply because they "should" is not a compelling argument.

   This lack of clarity is even more concerning considering **Quebec's ongoing Constitutional challenge of C-92 and Canada's judicial review of the CHRT order ensuring non-status First Nations children off reserve who are recognized by their Nations are eligible for Jordan's Principle. In its legal submissions on the Jordan's Principle appeal, Canada cites the "precedent" this case may set in light of C-92, signaling that the feds do not want to pay for off reserve services delivery.** In addition, Canada has refused to intervene in a case whereby the Government of Manitoba is clawing back the Children's Special Allowance from children in care resident off reserve. This means Manitoba is clawing back a children's benefit arising from federal law with no protest from Canada.

9. **What funding is there to support youth, Elders, traditional knowledge holders and professional staff in the provision of child and family services under First Nations jurisdiction?** This is unclear, but experience shows that including culturally-based employee assistance and workplace safety plans is important. This is particularly the case for community-based Elders, knowledge holders and helpers who live in community.

10. **How will Canada safeguard against repeating its discriminatory negotiation approaches whereby well-equipped First Nations negotiate better deals than communities with lesser capacity?** This too is unclear. Canada has not published any safeguards to ensure all First Nations communities are able to identify and secure the resources needed to achieve family safety and wellbeing. To assume that all Nations are on equal ground in terms of negotiating power ignores the reality that Nations have different histories negotiating with Canada, as well as the fact that the balance of power in all negotiations lies clearly with the federal government.

11. **What, if any, enforceable accountability mechanisms will bind Canada to ensure substantively equitable and needs-based funding to First Nations that take on jurisdiction?** Again, this is unclear. C-92 does not include a clear funding obligation, so Canada will likely push to include clauses that provide "certainty and predictability" in federal funding levels and offer little legal redress if such levels fall short. The problem is that "certain and predicable" funding has, historically, been set in

ways that benefit Canada and disadvantage children, families and communities. As noted above, the agency experience is that it takes 10 years to predict the level of funding required to provide proper services. During this time, flexibility is key to ensuring that agencies are able to meet the real needs of families as they emerge in different contexts and unique communities. Fixed funding agreements may be incapable of responding to the actual needs of the agency and families. In this context, a binding dispute resolution mechanism is vital given Canada's long and ongoing pattern of discriminatory child and family services funding. For example, Canada agreed to funding reviews and recalibrations in both Directive 20-1 and EPFA, but this never happened. Moreover, despite having a legal order that Canada must cease its discriminatory practices, 19 non-compliance and procedural orders have been required to bring Canada closer to compliance. The Tribunal's legal proceedings have stretched over 14 years and counting. This type of litigation to address federal funding gaps would be difficult for individual First Nations to pursue.

12. **What child and family service costs does Canada view as "in or out of the federal funding scope?"** This is also unclear. For negotiations to be transparent, Canada ought to disclose its position publicly so that First Nations can fashion their laws and funding negotiations in such a manner that the implementation is fully funded.

13. **Does Canada have any pre-conditions for funding First Nations laws or for entering into coordination agreements?** This is not clear.

14. **Why is Crown-Indigenous Relations and Northern Affairs (CIRNA) also involved in C-92, and what expertise and role does it have?** Canada says CIRNA is involved because of its expertise in self-government. There is no indication that CIRNA officials have received training on First Nations child and family services. Moreover, it appears that CIRNA will fund governance for C-92 whilst ISC will fund other elements, and it is not clear how they will coordinate this funding across departments. Considering that Jordan's Principle was created in response to jurisdictional disputes, the lack of clarity on roles and responsibilities between ISC and CIRNA is concerning.

15. **Does Canada have a plan to ensure children and families will receive services where a First Nations law has taken effect but there is no funding to operationalize it?** Canada says it "assumes" the provinces or a First Nations agency will continue to deliver services until the First Nation is ready to provide services. However, it is unclear if the provinces or agency will provide the services in accordance with the First Nations law or continue with provincial delegation. If the expectation is to operate according to First Nations law, there would need to be some time to adapt services and policies accordingly.

16. **What transition plans are there for First Nations agencies wherein a First Nation they serve takes full or partial jurisdiction under C-92?** It is unclear how Canada will ensure the agency is adequately funded per the CHRT orders whilst providing substantively equal funding to the First Nation.

17. **How will Canada assist First Nations with the coordination of provincial/federal laws required to do child welfare?** This is unclear, but Canada does not appear to have a cogent plan to address this. Child welfare laws are interconnected with other provincial and federal legislation. For example, child welfare authorities regularly interact with coroners' acts, public trustee acts, child and youth advocate acts, youth offender acts, mental health acts and more. Coordinating these laws will be important, and while a federal act has supremacy over a provincial law, it is unclear how tensions

between federal laws would be resolved.

18. **Can a First Nation have a phased-in model of jurisdiction?** Canada says it is open to phased-in jurisdiction. This is important, as from the agency experience, it takes a minimum of 5 years to develop the agency and deliver services, and a further 10 years to get predictability in budgets. There should be a variety of options, including partial jurisdiction.
19. **Will Canada provide funding for First Nations affirming their authority directly under Section 35 or via a self-government agreement?** This remains unclear. Canada has not made a clear public statement that it will fund First Nations pursuing jurisdiction directly per Section 35 or a self-government agreement.
20. **Will Canada provide liability coverage for First Nations and social workers acting on their behalf once jurisdiction is drawn down under C-92?** This is unclear. Provincial child welfare laws protect individual social workers against liability if they are acting in good faith, and such provisions ought to also be incorporated into First Nations laws to ensure social workers are safeguarded against personal liability exposure. The First Nation or agency operating under a First Nations law may find it challenging to address liability exposure. Very few underwriters are prepared to provide liability coverage for provincially-delegated child welfare agencies, and eligibility criteria have become much more restrictive given the insurance pressures arising from climate change and the pandemic. Typically, Canada seeks an indemnification clause in its agreements.
21. **Will First Nations laws be recognized internationally?** Canada has not disclosed its views on how international agreements affecting child welfare, such as the Hague Convention, will work for First Nations children subject to C-92. To our knowledge, Canada has not turned its mind to this question in any substantial way.
22. **What plans are there to coordinate First Nations and provincial/territorial child welfare to ensure a seamless and equitable system of care for children?** It does not appear that Canada has turned its mind to this yet.
23. **Will Canada fund post-majority care for First Nations youth or reunification services for children who were removed and have now grown up?** This is unclear.
24. **How will judges and lawyers be trained to adjudicate the First Nations laws?** This is unclear and a critical area, as it will be mainstream courts interpreting First Nations laws.
25. **Will Canada fund child advocacy and legal representation for children and families, such as a band representative, children's lawyer and legal aid programs?** This is unclear.
26. **Will Canada support First Nations that assume jurisdiction but are unable to provide services, in whole or in part, on a short term or longer-term basis due to things like natural disasters, labour shortages, etc.?** This is unclear. The 2005 Wen:de series of reports encouraged funding for a peer support system among agencies to provide this type of support, so that if an agency was temporarily unable to provide services, another First Nations agency (versus the province) would step in. Canada did not fund this approach, but it is a model for First Nations to consider.
27. **What is Canada's Final Domestic Demand Implicit Price Index (FDIPI)?** The FDIPI was developed by Canada to use as a cost-of-living adjustment for First Nations child and family services. It is not

broadly recognized or researched or used to adjust for cost-of-living increases in other areas. It was discredited for use in child and family services in 2005 but appears to being used again by the department. It is unclear if the current rendition has corrected for the shortcomings in the 2005 formula. In general, experts recommend using the Consumer Price Index (CPI).

28. **What process, if any, is undertaken to ensure any federal, provincial and/or First Nations laws are aligned with the *Act Respecting First Nations Métis and Inuit Children, Youth and Families*?** This is unclear. We have asked, for example, for information on how this act is harmonized with the *Indigenous languages Act* but have received no clear response from Canada.